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Nos. 40 and 217.

Supreme Court of the United States.

OCTOBER TERM, 1905.

ECLIPSE BICYCLE COMPANY,
Appellant,

vs.

WILLARD M. FARROW.

Additional

BRIEF FOR APPELLEE.

HENRY M. EARLE,
JOHN C. GITTINGS,
Counsel for Appellee.

C. G. Burgoyne, Walker and Centre Streets, New York.

Supreme Court of the United States,

OCTOBER TERM, 1905.

Nos. 40 and 217.

Old Numbers,

OCTOBER TERM, 1905.

Nos. 283 and 591.

Eclipse Bicycle Company,
Appellant,

vs.

Willard M. Farrow.

ADDITIONAL BRIEF FOR APPELLEE.

The statement of the case is already before the Court.

Argument.

The bill filed in this case did *not* (as alleged in appellant's additional brief, p. 6) pray for royalties on the device "described in Morrow's application filed on or about the 15th day of July, 1897," but it claims royalties on the "Morrow brake and coaster" substituted for the "Farrow brake and coaster." The said reference to the application was the allegation of a ma-

terial fact, illustrative of the scheme of fraud by the defendant. What particular design of "brake and coaster" the company should in the future make, was not suggested, nor was it suggested that it would make any other, but it was naturally anticipated that whatever devices called the "Morrow brake and coaster" were made by defendant would become the subject of royalties.

The auditor correctly construed the decree as appears in his opinions, but finally erred in assuming that the term mechanical equivalent was to be used in a technical sense as applied by patent attorneys, which was contrary to the intent of the bill. The complainant's contention lay in the fact that the defendant had wrongfully adopted a commercial substitute for his device.

That the auditor had the right to consider whether or not any of the devices made by defendant and designated "Morrow brake and coaster," or some similar name, were substitutes for Farrow's, plainly appears from the pleadings and the decree. This was not new matter; it was the same question applied to the same device in name, different mechanically, yet within Farrow's application. The case of Warner vs. Godfrey, 186 U. S., 356, does not apply; the situation is at absolute variance with that existing in the case at bar.

The appellant cannot, under the record, be found to have prosecuted the Farrow applications and protected same in accordance with the agreement. The president of the company, Fulton, was half owner of the Morrow application, and the attorney employed by the company to prosecute Farrow's applications was charged with the same duty for Morrow and Fulton, the result was what may well have been expected, Morrow received a patent; Farrow's applications were not prosecuted (see Test., Doolittle).

At the time the agreement was made, June 5, 1897, Fulton & Morrow "were utterly ignorant of any patents relating to coaster-brakes" (see Record, page 428). Morrow saw the Farrow device in May or June, 1897

(Record, p. 24), and on July 15, 1897, forty days after his company obtained the Farrow applications, he had progressed sufficiently to file an application for a device accomplishing the same object, by means of a different mechanical operation.

Skidmore, the company's patent attorney, says that he knew of the Stover & Hance Patent before the contract was signed, having been employed by Fulton to examine the records (see Record, pp. 36, 37). Fulton's knowledge of what he was buying from Farrow is plain he employed counsel for that purpose. On pages 188 and 189 of the Record, there appears an application of Morrow's made in 1896, for a hub-brake, (*not a brake and coaster*) his application for a device combining a coaster with the hub brake was filed July 19, 1897, after the Farrow applications had been purchased by his company, at the date of which purchase he was ignorant of any patents on such a device (Record, page 428).

The company not only obtained the great commercial advantages of appearing first in the field, with a practical brake and coaster, and ridding itself of Farrow as a competitor, but it enabled its president and superintendent, and its attorney to use the Farrow applications to excellent advantage.

Farrow was limited, through the peculiar condition in which the defendant placed him, as to testimony by which to prove his case, and was dependent upon hostile witnesses. Especially was he at a disadvantage relating to his applications for patents, as the rules of the Patent Office precluded his obtaining full knowledge. Some allegations of these hostile witnesses he was unable to combat, but he was relieved from the onus placed upon him by the rules of evidence (Appellant's Additional Brief, p. 20), by the fact that the circumstances of fraud were pleaded and established.

Appellant contends that a supplemental bill was a prerequisite to a claim for any "Morrow brake and coaster" differing in design from the one in use at the time the bill was filed. The bill asks royalties for de-

vices substituted for Farrow's. The decree directed the auditor to take testimony to determine this question. The auditor found that two styles of the "Morrow brake and coaster" were substituted by the Company, and both were within the Farrow applications. The appellant had every opportunity of presenting its defense to this, and the record shows the energy and fulness with which it did so; it had ceased to operate in this jurisdiction; in fact the company had become a hollow-shell; a supplemental bill, and its defense could have embraced nothing not included in this trial, and as held by the Court of Appeals, the ends of justice were met (Record, p. 434). Had the decree not have provided for this contingency, it would have been possible for the defendant to constantly change, in some slight degree, a detail of the device, thus requiring as many supplemental bills as they may make changes.

The Supreme Court D. C. and the Court of Appeals agree, after three presentations before each Court, upon facts in this case established by the evidence, and applying the rule adopted by this Court in the case of Stuart vs. Hayden, 169 U. S., p. 1, and 181 U. S., p. 124, a different view will not now be taken unless it clearly appears that the facts are otherwise.

The record in this case should not properly include any matter not before the Courts below on the trial thereof upon the merits. The motion to reopen the case was discretionary, is not reviewable, and the record relating to these proceedings is out of place. The findings of the Auditor had the same force and effect as the verdict of a jury, and the Court confirming same, passed upon a matter of law.

It is claimed that the Morrow device (Ex. E 10) is difrfeent from the Farrow, and considerable of the record is devoted to proof on this point. The differences in these devices have not been elaborated herein, but reference is made to the testimony of Doolittle (Record, p. 257 *et seq.*) and McGill (Record, p. 250, *et seq.*), by which it appears as alleged in the bill that the "Morrow

Brake and Coaster" is an elaboration and improvement upon the Farrow Brake and Coaster, that the two accomplish the same result, through a similarity of means which are fully set forth.

The appellant's brief urges that Farrow's remedy rested in that clause of the agreement providing that his patents should revert to him in the event of a breach or default on the part of the company; it is submitted that a Court of Equity recognizes no right on the part of one party of the agreement, in contravention of the terms thereof, to wrongfully place the other party at a disadvantage, involving his property rights, and then return same as a defense to a claim for damages. The record contains no evidence that Farrow's property was offered to him, although he repeatedly asked for information, and the record, pages 226 and 227, shows by Appellant's Exhibit C, that in February, 1897, the company was requested to afford Farrow the privilege of exploiting his invention—no answer was received and this suit followed.

On page 26 of appellant's additional brief a letter from appellant is partly quoted in support of the theory that the inventions reverted to Farrow, a reply thereto is contained in the remainder of the letter *not quoted*, and in the reply thereto, following same, as above referred to (see Record, p. 226).

It is respectfully submitted that Farrow was deprived of his patent rights, and the use of them commercially at a time when they were particularly valuable; that the company reaped the advantage of the position in which it was placed through its agreement, it defended same by a fraud upon Farrow's rights, has wrongfully refused to compensate him as agreed, and that the judgment for that purpose should be sustained.

HENRY M. EARLE,
Counsel for Appellee.